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September 10, 1997

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GDH/MD

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

JULY 10, 98

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Traditional Medicinals, Inc.

Serial No. 74/431,164

Jay H. Geller for Traditional Medicinals, Inc.

Karen Marie Strzyz, Trademark Examining Attorney, Law Office 101
(R. Ellsworth Williams, Managing Attorney).

Before Hohein, Hairston and Walters, Administrative Trademark
Judges.

Opinion by Hohein, Administrative Trademark Judge:

Traditional Medicinals, Inc. has filed an application
to register the mark "GOLDEN GREEN TEA" for "teas".¹

Registration has been finally refused under Section
2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that
applicant's mark, when applied to its goods, so resembles the

¹ Ser. No. 74/431,164, filed on September 2, 1993, which alleges dates
of first use of August 10, 1993. The words "GREEN TEA" are
disclaimed.

Ser. No. 74/431,164

mark "THE GREEN GOLD TEA" and design, which is registered, as



reproduced below,

for "tea,"² as to be likely to cause confusion, mistake or deception.

Applicant has appealed. Briefs have been filed³ and an oral hearing was held. We affirm the refusal to register.

As a general proposition, our principal reviewing court has noted that, "[w]hen marks would appear on virtually identical goods ..., the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines." Century 21

² Reg. No. 1,852,027, issued on August 30, 1994, which sets forth a date of first use anywhere of December 21, 1992 and a date of first use in commerce of February 7, 1994. The words "THE" and "TEA" are disclaimed.

³ Applicant, with its initial brief, submitted excerpts of certain dictionary definitions. While, under Trademark Rule 2.142(d), such evidence is technically untimely, we have considered it inasmuch as the Examining Attorney, in her brief, has treated the definitions as being of record. See *In re Nuclear Research Corp.*, 16 USPQ2d 1316, 1317 (TTAB 1990) at n. 2. Moreover, and in any event, it is well settled that judicial notice may properly be taken of dictionary definitions. See, e.g., *Hancock v. American Steel & Wire Co. of New Jersey*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953) and *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 1034 (1994). Here, both applicant's goods and registrant's goods are identified as tea(s). Although applicant's specimens of use show, as underscored by the disclaimer in the application, that the goods it offers under its mark are green tea while, as applicant observes, "[t]he type of tea covered by the registration is not stated," the respective goods must nevertheless be considered to be identical inasmuch as the application and registration broadly identify the goods simply as tea(s).

Applicant argues, however, that despite the identity of the respective goods, confusion as to the source or sponsorship thereof is not likely because the marks at issue do not have the same appearance, they are not a transposition of each other and "they are totally dissimilar in sound". In particular, applicant "submits that it is clear [that] when the two marks are compared side by side, there is no similarity in appearance due to the fact that:

Applicant's mark is the words GOLDEN GREEN TEA while the registered mark is comprised of the barely legible words GREEN GOLD TEA superimposed on a disproportionately and extremely large, overpowering three leaf sprig, surrounded by a double lined box out of which emerge two of the leaves. From the drawing in the registration, it is extremely difficult to read the words "THE GREEN GOLDEN TEA". On their face, the marks do not look alike and do not have the same appearance.

Consequently, since "[o]ne can barely see the words" in registrant's mark, applicant maintains that it is the leaf design

therein which "totally dominates the mark" and distinguishes it visually from applicant's mark.

Applicant further points out that, inasmuch as its mark contains the word "GOLDEN" rather than "GOLD," its mark--strictly speaking--is not a transposition of the words "GREEN GOLD" in registrant's mark. Moreover, according to applicant, the respective marks are not only dissimilar in sound but, in light of the dictionary definitions furnished by applicant, "it is clear that the connotations of the noun GOLD and the adjective GOLDEN are entirely different."⁴ Thus, in light of the asserted differences in meaning, applicant contends that, when considered in their entirety, its "GOLDEN GREEN TEA" mark engenders a completely different commercial impression from registrant's "THE GREEN GOLD TEA" and design mark.⁵

⁴ Specifically, although the excerpts from Webster's Ninth New Collegiate Dictionary (1986) at 526 do indeed show that the noun "gold" is defined, inter alia, as "**1** : a malleable ductile yellow metallic element that ... is used esp. in coins, jewelry, and dentures," while the adjective "golden" is listed as signifying, among other things, "**2 a** : having the color gold," the former is also defined as "**3** : a variable color averaging deep yellow" and the latter is set forth as meaning "**1** : consisting of, relating to, or containing gold." Such terms, as applicant's own evidence shows, may therefore be considered as essentially synonymous in meaning rather than being, as applicant urges, "entirely different".

⁵ Applicant also argues, without any affidavit or other evidentiary support, that it "has used its mark ... since August, 1993," while "[t]he registered mark has been used by the registrant since December 1992." Applicant asserts, in view of the period of contemporaneous use of the respective marks, that it "is aware of no instances of confusion" and that, "while absence of actual confusion is not dispositive of likelihood of confusion, it is a factor to be considered" which "tip[s] heavily in applicant's favor." We note, however, that while the absence of any incidents of actual confusion over a significant period of time is a factor indicative of no likelihood of confusion, such is a meaningful factor only where the record demonstrates appreciable and continuous use by the applicant of its mark for a significant period of time in the same markets as those served by the registrant under its mark. See, e.g., Gillette Canada

We agree, however, with the Examining Attorney that confusion is likely to result from contemporaneous use of the marks "GOLDEN GREEN TEA" and "THE GOLD GREEN TEA" and design for tea. While applicant is correct that the respective marks must be considered in their entirety, it is nevertheless the case that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entirety." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, "that a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark" 224 USPQ at 751.

Here, while there are indeed differences in the respective marks which are apparent upon a side-by-side comparison,⁶ the prominence of the three-leaf design in

Inc. v. Ranir Corp., 23 USPQ2d 1768, 1774 (TTAB 1992). It is not a mitigating factor where, as here, the record is devoid of information concerning the nature and extent of the marketing activities of applicant and registrant under their respective marks during the asserted period of contemporaneous use and such period has been relatively brief. In this case, we not only have no indication as to what registrant's experience has been, but we have no details as to the level of sales, advertising expenditures and marketing areas served by applicant during an asserted period of contemporaneous use of less than four years. Compare In re General Motors Corp., 23 USPQ2d 1465, 1470-71 (TTAB 1992). The purported absence of any instances of actual confusion thus does not have any meaningful bearing on the issue of likelihood of confusion in this case.

⁶ Such a comparison, however, is not the proper test, generally speaking, to be used in determining the issue of likelihood of confusion since it ordinarily is not the way that a prospective customer will be exposed to the marks. Instead, it is the similarity

registrant's mark is an insufficient basis for regarding such mark as being distinguishable from applicant's mark. This is because, as applied to labeling or packaging for tea, the three-leaf design in registrant's mark would be regarded as a representation of tea leaves and, thus, such design is descriptive of registrant's goods.⁷ Consequently, despite the prominence of the three-leaf design, it is the mark "THE GREEN GOLD TEA" in registrant's mark which, in terms of indicating origin or affiliation, would be most likely to be impressed upon a customer's memory and which, as the Examining Attorney notes, would be used by a prospective purchaser when requesting or otherwise looking for registrant's tea. Such words, when framed by a rectangular border and superimposed over a design of three tea leaves, are simply not so minuscule as to be imperceptible, as contended by applicant.

We agree, moreover, with the Examining Attorney that, not only are the words "THE GREEN GOLD TEA" in registrant's mark noticeable, but such words constitute, as a practical matter, a

of the general overall commercial impression engendered by the marks which must determine, due to the fallibility of memory and the consequent lack of perfect recall, whether confusion as to source or sponsorship is likely. The proper emphasis is accordingly on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks or service marks. See, e.g., *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973); *Envirotech Corp. v. Solaran Corp.*, 211 USPQ 724, 733 (TTAB 1981); and *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Thus, even though applicant's and registrant's goods are identical, it cannot be assumed that the tea sold by each will invariably be sold side-by-side in all outlets at which goods of such kinds are marketed.

⁷ Counsel for applicant conceded at the oral hearing that prospective purchasers would view the leaves in registrant's mark as tea leaves when the mark is displayed on packaging for registrant's tea.

transposition of applicant's "GOLDEN GREEN TEA" mark. As the Examining Attorney persuasively points out in her brief:

The applicant's transposition [of the literal elements of registrant's "THE GREEN GOLD TEA" and design mark] does not alter the overall commercial impression of the applicant's mark. GOLDEN GREEN and GREEN GOLD both connote tea that is green and gold(en) in color or tea that is green and precious or of high quality.

Given the substantial identity in their overall commercial impression, and the substantial similarities shared by the marks in sound, appearance and connotation, the contemporaneous use thereof in connection with the same goods--tea--would be likely to cause confusion. See, e.g., In re Wine Society of America Inc., 12 USPQ2d 1139, 1142 (TTAB 1989) [mark "THE WINE SOCIETY OF AMERICA" and design for wine club membership services including the supplying of printed materials held likely to cause confusion with mark "AMERICAN WINE SOCIETY 1967" and design for a newsletter, bulletin and journal of interest to the registrant's members] and In re Nationwide Industries Inc., 6 USPQ2d 1882, 1884 (TTAB 1988) [mark "RUST BUSTER" (with "RUST" disclaimed) for rust-penetrating spray lubricant held likely to cause confusion with mark "BUST RUST" for penetrating oil].

Applicant insists, nevertheless, that "any likelihood of confusion is lessened" because the respective goods "are not purchased on impulse." Instead, according to applicant, the products "are purchased by sophisticated, knowledgeable consumers looking for a particular product and particular brand" of tea. Again, we concur with the Examining Attorney that tea typically

"is not an expensive or complicated" product; that it is commonly found prepackaged in supermarkets and grocery stores; and that it is often purchased on impulse. Furthermore, even if tea drinkers, by and large, were to be viewed as sophisticated and knowledgeable about the types of tea which they prefer, such does not necessarily mean that they are knowledgeable or sophisticated in the field of trademarks or immune from source confusion. See, e.g., In re Decombe, 9 USPQ2d 1812, 1814-15 (TTAB 1988) and In re Pellerin Milnor Corp., 221 USPQ 558, 560 (TTAB 1983).

Finally, to the extent that there could be any doubt as to our conclusion that contemporaneous use of the marks "GOLDEN GREEN TEA" and "THE GREEN GOLD TEA" and design in connection with tea is likely to cause confusion, we resolve such doubt--as we must--in favor of the registrant. See, e.g., In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

Decision: The refusal under Section 2(d) is affirmed.

G. D. Hohein

P. T. Hairston

C. E. Walters
Administrative Trademark Judges,
Trademark Trial and Appeal Board